Georgia Public Defenders Standards Council

Legislative Oversight Committee

Annual Report

February, 2010

Senator Preston W. Smith, Chairman

EXECUTIVE SUMMARY

Pursuant to O.C.G.A. 17-12-10.1(b), the bicameral legislative oversight committee of the Georgia Public Defender Standards Council (hereafter, "Council") met the requisite number of times before the initiation of the 2010 legislative session.[1] During those meetings, several themes arose which threatens the continued viability of Georgia's statewide indigent defense system.

Despite the General Assembly creating a new statewide indigent defense system and greatly increasing funding for its implementation, external forces have caused parts of the system to become structurally broken. Recent Court developments and State Bar of Georgia actions likely have destroyed Georgia's ability to provide and fund a comprehensive public defenders' system.

Much progress has been made by the new leadership of the Georgia Public Defenders' Standards Council and its director, Mack Crawford, has worked very hard to respond to the legislature's concerns and manage the operation of the system. The core operation of the system is handled by local offices of the circuit public defender ("CPD"). With very few exceptions, these local offices are staffed by hard-working professionals who have done an extremely good job representing indigent people accused of crimes. That core competency of the system which represents the vast majority of criminal cases is working well.

However, despite the good intentions and hard work of these professionals and practitioners at the local level, their work has been largely overshadowed by ideological crusaders who consistently work to hijack and manipulate the system. These seemingly well-intentioned crusaders pursue an agenda which is not consistent with the State's goal of meeting its constitutional obligation to provide adequate criminal defense for all indigent Georgians accused of crimes. Without any regard to the costs to the State, advocates have used litigation against the State and positional power within the State Bar of Georgia to seek judicial orders that usurp and disregard the policies of the elected legislature in favor of compelling the State to adopt expensive and unattainable goals that exceed the requirements of the Georgia Constitution.

While the CPD practitioners in the field have largely succeeded in creating a well-functioning system, their progress has been severely knee-capped by these crusaders who have all the purist ideological zest of an ivory-tower professor without any understanding of practical realities required to actually manage a system with scarce recourses. This approach, coupled with a general unwillingness to partner with the General Assembly to help shape a successful system, has burdened the system to the point that it is now collapsing under its own weight.

The critics of the system consistently complain that it is "underfunded" and its funding has been severely diminished. Some members of the press also have inaccurately characterized the posture of its funding. It is true that due to an historic State and national economic downturn, the reduced revenue available has resulted in virtually every operation of the State finding ways to deliver critical service with less funding. But it is grossly inaccurate to characterize this program as severely diminished in its funding. The Georgia General Assembly places a high priority on fulfilling its constitutional obligation to provide an adequate criminal defense for the indigent.

[1] In addition to Judiciary and Appropriations committee meetings, Sen. Preston Smith chaired bicameral meetings of the General Oversight Committee on January 6th, August 24th, November 4th, and December 15th of 2009.

Indeed, between the years of 2000 and 2010the legislature has seen the aggregate expenditures in furtherance of that system double from $54 million to approximately $111 million. It should also be noted that since the FY2009 General Budget the average median change by program across the entire State budget was -12.6%. During that same time period the change in the two public defender programs was only -2.34%. In fact in the FY 2010 amended budget proposal, every other agency received a cut while the legislature recommended that the Public Defenders' essentially remain unchanged in its budget submission.

Nevertheless, it has become apparent that to the crusading critics of the system, no amount of funding will ever be sufficient. And, while everyone acknowledges the State's constitutional obligation to provide an adequate defense, it is not the State's only funding obligation set out in the Constitution. Indeed, by way of example, the State also has a constitutional duty to adequately fund K-12 secondary education for its citizens. Due to the competing needs of the State, legislators are elected by their constituents to make difficult decisions about adequately funding these competing priorities. It disrespects the separation of powers for the judiciary to substitute its policy judgment for that of the elected legislature. And, while the Governor and legislature have a strong track record of increased funding for this priority as compared to the previous system, the legislature should not be forced to provide poor criminals a higher level of defense than the Constitution requires at the expense of Georgians' other funding priorities like education, healthcare and the public safety of its citizens.

Despite repeated requests for the production of a 'zero-based' budget which links the State's costs to specific statutory requirements set forth in code, the legislature has still not received such a budget from the Council largely because they have been unable to control the exploding costs associated with cases that have been conflicted out to private billing attorneys.

Moreover, rather than focusing on what the code calls for in terms of a State contribution to the system, the defense advocates and the courts repeatedly focus on the maximum amount of money that may be available to be spent from the revenue streams – a formula that guarantees a burgeoning bureaucratic system with disproportionately escalating budgets. Budgeting to the maximum available revenue is completely unrelated to justifying the actual needs of the system.

The Council has made decisions to "conflict out" a massive number of cases to private attorneys who bill the State by the hour for their services. There is an over-incentive to conflict cases out to private attorneys coupled with a proposed State Bar Advisory Opinion, and Judges' orders which recognize a right of every defendant to immediately appeal his/her conviction based upon the grounds of 'ineffective assistance of counsel' which then cannot be handled by the public defenders' system. This has made the system exponentially more expensive.

These external forces have usurped the authority of the legislature to establish policy and manage the system with the scarce resources of the budget. Driven by ardent defense advocates who eschew any use of the death penalty and lobby for the best defense money can buy, they have imposed changes to the system that are causing it to collapse under its own weight and are negating the representative legislature's policies related to criminal defense cases and their penalties, including the imposition of the death penalty.

INTRODUCTION & BACKGROUND

The Public Defender Standards Council Legislative Oversight Committee was created by O.C.G.A. § 17-12-10.1. The purpose of the joint legislative oversight committee is to review and evaluate information on new programs, standards, strategic plans, program evaluation reports, and budget recommendations proposed by the council on an annual basis. The committee also reviews and evaluates the fiscal impact of fees and fines on counties, and attempts to identify opportunities to reduce or consolidate fees, fines, and surcharges. The Chairman of the joint legislative oversight committee is required to prepare an annual report of the committee's activities and findings and submit same to the membership of the General Assembly and the Governor.[2]

The Georgia Public Defender Standards Council ("Council") was created by House Bill 770 in 2003, and officially replaced the former Georgia Indigent Defense Council on December 31, 2003. Although originally the Council was part of the judicial branch of government, the passage of Senate Bill 139 in 2007 transferred authority over the Council to the executive branch. According to statute, the Council is "responsible for assuring that adequate and effective legal representation is provided, independently of political considerations or private interests, to indigent persons who are entitled to representation under this chapter."[3]

ISSUES

The Public Defender Oversight Committee is statutorily required to meet three times each year. Each of the 2009 meetings focused on different aspects of the Council's operation and financial responsibilities. Since its inception six years ago, budget requests from the Council have increased dramatically, and one goal of the legislative oversight committee is to investigate the reasons behind the consistently rising budgetary demands and ensure that the Council is operating efficiently while providing constitutionally required indigent defense.

FUNDING SOURCES

The Indigent Defense Fund represents the sum of money collected as a result of several statutory provisions, including the indigent defense application fee, the $15 civil action surcharge, and the Peace Officer, Prosecutor and Indigent Defense Funding surcharge.[4] The Fund collected $ 45.6 million in Fiscal Year 2008 and $ 43.7 million in Fiscal Year 2009. As of February 23, 2010 $ 28.5 million has been collected in FY10. The Council's entitlement to all or part of that Fund was a major point of contention between the Council and the oversight committee.

[2] O.C.G.A. § 17-12-10.1(f)
[3] O.C.G.A. § 17-12-1(c)
[4] Article 4 of Chapter 21 of Title 15 of the O.C.G.A.; O.C.G.A. §§ 15-6-95, 15-21A-6

Indigent defense in Georgia is funded using a variety of sources. One such source was cut off by the judicial branch. Interest on Lawyer's Trust Accounts ("IOLTA") funds, are collected by order of the Georgia Supreme Court and managed by the Georgia Bar Foundation for the general purpose of supporting legal services for lower income Georgia citizens. The judicial branch made the decision to stop providing IOLTA funds to the Council after Fiscal Year 2008. The loss of this funding source created a funding shortfall for the Council because the average amount of IOLTA funds was approximately $1.9 million per year.

In addition to the permanent loss of IOLTA funding, the collection of the $50 indigent defense application fee is available for use in funding, although judges frequently waive the requirements for criminal defendants so the collection of this fee have been less than anticipated.[5]

The Clerk's and Sheriff's Fund is a major source of financial support for the Council. According to O.C.G.A. § 15-16-27, this fund is responsible for remitting money directly to the Council on a quarterly basis, and the Council in turn is required to allocate these funds to the circuit public defender offices. The remittances from this fund to the Council have varied widely; in Fiscal Year 2008 the Council received approximately $2.4 million, and in Fiscal Year 2009 the Council received approximately $3.0 million.

The Council also collects administrative fees from contracts with the counties for State-paid indigent defense employees. The Council is allowed to use this money to cover expenses for training, travel, online legal research tools, and computers. In addition, the fees pay for support staffs who handle accounting, benefits, contracts and payroll for the Council. The administrative fees include a 5 to 7% personnel charge and a 5% operating charge to participating counties. The Council collects annually between $1.8 million and $2.0 million as a result of these fees.

As a general matter, the oversight committee has consistently requested that the Council create a zero-base budget model that also sets out both the State and county contributions accurately and completely, which they have yet to provide. The counties have testified that often judges tend to be concerned with fair trials without adequate regard to cost consideration. This results in orders from the bench that the counties pay for additional expenses, such as an investigator or additional depositions. The counties have no way to refuse a judge's order, and therefore their contributions to indigent defense are unpredictable and increasingly more expensive.

[5] O.C.G.A. § 15-21A-6(c) states: "Any person who applies for or receives legal defense services under Chapter 12 of Title 17 shall pay the entity providing the services a single fee of $50.00 for the application for, receipt of, or application for and receipt of such services. The application fee may not be imposed if the payment of the fee is waived by the court. The court shall waive the fee if it finds that the applicant is unable to pay the fee or that hardship will result if the fee is charged. If the application fee required by this subsection has not been paid or waived at the time the defendant is sentenced, the court shall impose such fee as a condition of probation."

CONFLICT CASES

The single biggest factor leading to the collapse of the public defender system is driven by the costs associated with private lawyers hired to represent defendants in cases where there is an alleged "conflict of interest" of the state public defender. The ethics rules concerning a lawyer's duty to withdraw from representation if a conflict of interest arises are established by the Georgia Supreme Court and set forth in the Georgia Rules of Professional Conduct (see e.g. Georgia Rule of Professional Conduct 1.7). Currently, there is no penalty for a lawyer asserting his/her belief that a conflict exists (or may arise) and withdrawing from representation. However, failure to declare a conflict where the lawyer knew or (is it later determined that he) should have known may result in severe professional conduct sanctions including his/her permanent disbarment from the practice of law. Consequently, there is an over-incentive for an attorney to declare a conflict or potential conflict-of-interest. The result is that the Council must appoint more expensive private counsel rather than trying to resolve the issue within the context of the statewide public defenders' system. Absent a constitutional amendment, the Supreme Court has exclusive authority to regulate the practice of law and could offer clarity to this issue for lawyers by amending the rules.

Conflict cases at the trial level occur most often when there are multiple co-defendants, in which case judges often prohibit a single public defender office from representing every defendant, thus necessitating the hiring of a private attorney. Such private attorneys are hired at an hourly rate, and raising the cost per case significantly higher than for cases that are kept in-house.[6] In the past, circuit public defender offices attempted to keep conflict cases at the trial level in-house by establishing a 'Chinese Wall' within their office.[7] Although this is a generally accepted way to handle conflict cases, individual judges have the discretion to disallow such efforts. However, the State Bar's proposed Advisory Opinion regarding conflict cases will disallow even this practice.

The Council's previously held that the most efficient way to reduce the number of private conflict attorneys needed for conflict cases is to open regional satellite conflict offices around the state, staffed by state employees. According to the Council, the legislature would begin to see the savings associated with in-house satellite conflict offices when there are a sufficient number around the state so that private attorneys will no longer be needed. The Council predicted some savings as soon as the Fiscal Year 2009 budget, but the Legislative Oversight Committee has not yet received a report from these savings.

[6] According to the Council: In-house cost per case: $374; Conflict cost per case: over $1,000. In addition to paying the conflict attorney, there are often other costs, such as travel expenses and hiring private investigators and/or expert witnesses.

[7] A 'Chinese wall' refers to procedures taken by a firm to prevent information obtained while representing a client from being disclosed to employees in the same firm who represent other clients that may profit from the information.

Following the model used in other states, the Council has also engaged the services of private attorneys who have voluntarily agreed to contract for a number of cases at certain negotiated rates. However, as discussed in below, Plaintiffs' Attorneys have now filed a class action asking Fulton County Superior Court Judge Jerry Baxter to invalidate those contracts on the grounds that the Plaintiffs' attorneys believe the State should pay the private defense lawyers a higher rate than they voluntarily agreed to be paid under their contracts.

Capital conflict cases are more expensive because of the constitutional safeguards built into every death penalty case. The Brian Nichols case, which cost the state millions of dollars, exacerbated the need for the Council to have a policy for dealing with extraordinary cases. The discussions surrounding widely disparate conflict (and other) policies among the local CPD offices also led to recommendations that the legislature consider some additional direct-line management authority of the Director to create a more uniform statewide operation of CPD offices.

IMPACT OF SUPREME COURT'S OPINION IN *GARLAND V. STATE*:

In 2003, Mack Garland and his brother Larry committed armed robbery in Blue Ridge, Gilmer County, Georgia. Appointment of counsel to defend Mack Garland against the charges was made on December 19, 2003, and the State paid for the criminal defense through the public defenders system. Upon conviction by a jury, Mack Garland argued that he was convicted not because he was actually guilty but because he didn't have better lawyers to defend him. He asserted an appeal of his conviction based upon 'ineffective assistance of counsel.' Since his appeal was based upon proving that the first appointed lawyer was essentially incompetent in the defense, the argument was that he would need another new lawyer appointed to prove that the first lawyer(s) did an ineffective job. In January of 2008, the Georgia Supreme Court, rendered an opinion in the case reversing the Court of Appeals and holding that every single defendant was entitled to assert an 'ineffective assistance of counsel' appeal and the State was required to pay for that appeal too.

As a result, in Georgia, someone who commits a crime is entitled to have the State pay for a lawyer to defend against the criminal charges. Then he/she is entitled to have another new lawyer appointed (and paid for by the State) to pursue an appeal to try and prove that the first State-provided lawyer was ineffective in order to overturn a conviction by a jury of his peers. This court ruling has substantially expanded the financial cost of the system.

IMPACT OF STATE BAR OF GEORGIA ADVISORY OPINION:

Historically there were no restraints on the declaration of conflicts when the State public defenders' agency began. At the end of Fiscal Year 2007 it became apparent that conflict expenditures were out of control and were not being accounted for in a proper manner. There were meetings of the circuit public defenders regarding the situation, and most agreed to institute policies to properly evaluate whether conflicts actually existed and eliminate the

unmeritorious declaration of conflicts. Many circuits chose to improve this problem by waiting to declare conflicts until actual, meaningful conflicts arose. Some circuits assigned designated lawyers in their defender office to handle conflicts exclusively in-house, while other circuits developed internal protocols which allowed conflict cases to be assigned to separate trial teams that carefully protected the confidential information of clients who may have conflicting interests. Other offices continued to conflict cases at essentially the same rate as they had always done and some appear to be declaring "conflicts" as a case management tool for their workload. The overall result of these management actions by the Circuit Public Defenders ("CPDs") was to significantly reduce the number of conflicts declared, as demonstrated by the conflict case numbers from FY2008 and FY2009 as compared to the previous years.

The State Bar was asked for an opinion regarding the in-house handling of conflicts, and the initial advisory opinion supported handling conflicts in-house. However, advocates in the private criminal defense bar and the State Bar's Indigent Defense Committee objected to this method and the new Amended Proposed Formal Advisory Opinion No 07-R1 resulted (published on December 11, 2009). This opinion reversed the previous State Bar position and would prohibit the CPDs, and other entities within the system, from handling any potential conflict cases within an office with a common supervisor (likely CPD, Capital Defender, and Conflicts Division Director).

Under the argument promoted by the State Bar, it is no solution to create a separate conflict division because it would only support the "second" defendant in a multi-defendant case. If there are multiple defendants charged, this structure would require a separate "conflicts division" for each defendant charged, which is completely impractical to implement. Unless, of course, the current system is simply disbanded and the State returns to the previous system where all defendants were represented by individual contract or panel attorneys – which seems to be the only logical conclusion to draw from the Bar's position.

The proposed opinion that the Georgia Bar is promulgating to impute a conflict of interest to a public defender's office is neither a novel question nor is it a universally held opinion by other states. Other states' courts and committees have allowed for the possibility that there can be sufficient separation of lawyers even within the same office that imputation should not be automatic.[8]

So, it is erroneous to assert that the expensive "Georgia Rule" proposed by the State Bar is the only (or even the best) way to handle conflicts within a public defenders' system. The table below shows the monthly declaration of conflicts statewide by fiscal year; the numbers have been adjusted to eliminate cases where defendants hired private lawyers, didn't qualify, disappeared and other situations where cases were not handled to plea, trial, or dismissal.

[8] (See e.g. Graves v. State, 619 A.2d 123, 133-134 (Md. Ct. of Special Appeals 1993); Cal. Formal Op. No. 2002-158 (Sept. 2002); Montana Ethics Op. 960924. Others have decided more generally against a per se rule of imputation of conflicts. *See* Bolin v. State, 137 P.3d 136, 145 (Wyo. 2006); State v. Bell, 447 A.2d 525, 529 (N.J. 1982); People v. Robinson, 402 N.E.2d 157, 162 (Ill. 1979); State v. Cook, 171 P.3d 1282, 1292 (Idaho App. 2007)).

FELONY CONFLICT CASES DECLARED STATEWIDE BY FISCAL YEAR

	FY2005[9]	FY2006	FY2007	FY2008	FY2009	FY2010*
July		716	846	481	494	719
August		916	976	511	534	654
September		847	1,023	447	599	713
October		692	1,036	613	603	636
November		657	887	500	404	486
December		657	730	462	414	587
January	607	901	1,034	531	501	698
February	548	918	830	565	501	
March	743	1,025	870	675	482	
April	765	915	809	726	563	
May	728	1,268	600	710	609	
June	793	959	481	512	635	
TOTAL	**4,184**	**10,471**	**10,122**	**6,733**	**6,339**	**4,493**

Before the budget crisis in FY 2007 the individual circuit offices declared conflicts freely, and that after that date most circuits found alternative methods to deal with these cases. Most believe that if the State Bar's proposed advisory opinion is formally adopted and approved by the Supreme Court, we can expect conflict appointments will return to unsustainable FY2006 levels or higher. Because some circuits were very conservative in declaring conflicts before the budget crisis, it is probable that the true impact of the new bar rule will be even greater than FY 2006 levels, as the conservative circuits will have to conform to the rule. Some CPDs had conflict numbers that were significantly lower than their counterparts during those years. These CPDs would not be permitted to handle any potential conflict cases internally, and the result would be historically high conflict numbers for them in addition to the increase from other offices to pre-FY2008 numbers. The impact on the Georgia Capital Defender and the GPDSC Conflicts Division, due to their supervisory structure, would have to be accounted for as well.

Similarly, we now see the effect of Garland v. State, 283 Ga. 201, (2008), which was decided at the end of February 2008. Appellate conflicts averaged 13 per month between the beginning of the austerity period in July, 2008 and the end of February 2008, when Garland was published. After Garland the monthly average has increased to more than 27.

[9] FY2005 and FY2010 represent partial year totals only.

FELONY APPEAL CASES DECLARED STATEWIDE BY FISCAL YEAR

	2005	2006	2007	2008	2009	2010
July		11	24	16	43	36
August		7	24	12	11	38
September		10	25	9	27	28
October		12	24	12	25	30
November		4	20	13	24	13
December		9	30	10	23	29
January	5	7	26	18	23	
February	6	19	24	13	16	
March	11	30	23	30	18	
April	6	22	23	48	27	
May	7	31	18	32	22	
June	15	22	23	33	32	
TOTAL	50	184	284	246	291	174

After encouraging the formation of a "State law firm" for the purpose of providing indigent defense, the Courts and the State Bar have now greatly increased the types of cases and appeals to which a defendant is entitled to a free lawyer. And now, having disqualified that same "State law firm" from providing the free service to those accused to committing crimes, the State is back in the business of outsourcing the work back to private attorneys (which was the very impetus for the creation of the statewide system in the first place). Accordingly, it appears that the same people who insisted on the creation of a new statewide system have now constructed a rubric that ensures the failure of that same system and demands a return to the old system of using a panel of private appointed contract counsel. Under the old system, since individual lawyers were on a panel or contract for representation, rather than working for the State's public defender system, there were no issues regarding conflicts within the "State's system."

If, or when, the Supreme Court adopts the State Bar's proposed advisory opinion, it will have a devastating financial impact on the viability of the system. In fact, already in the wake of its publication and in anticipation of its adoption, Georgia has seen the number of declared conflicts skyrocket.

The revised bar opinion was first made public on December 11, 2009, a Friday. It is instructive to review weekly totals of selected circuits to compare the change in declared conflicts in the weeks immediately prior to and subsequent to the publication of the proposed State Bar Advisory Opinion.[10]

	Brunswick	Cherokee	Coweta	Griffin
October 5 – 11	1	1	3	5
October 12-18		2	11	15
October 19-25		5	5	10
Oct.26 - Nov. 1		3	5	11
November 2-8	1	2	6	20
November 9-15		4	11	14
November 16-22	1	2	2	9
November 23-29			2	3
Nov. 30- Dec. 6		6	3	7
December 7-13	1	4	2	5

*****Date of publication of State Bar of Georgia's Proposed Advisory Opinion regarding conflicts.**

December 14-20		2	32	19
December 21-27		1	7	7
Dec. 28- Jan. 3		2	7	11
January 4-10	2	3	15	16
January 11-17	7	6	30	14
January 18-24			16	12
January 25-31		7	24	16
February 1-7	1	3	18	24
February 8-14	3	4	31	14
February 15-21	7	3	14	13

10 Wks before Bar opinion	4	29	50	99
10 Wks after Bar opinion	21	35	196	151

Prior to the Proposed Advisory Opinion from the State Bar, plans were underway by the GPDSC Conflicts Division to propose the statewide adoption of a 'Conflicts Plan' to require all Circuit Public Defender offices with a certain number of State paid positions to adopt a policy for the representation of conflict cases using the trial team and ethical internal protocol method. This plan would have offered a defensible uniform system for recognizing and ethically representing conflict cases in-house, thus reducing the declaration numbers in the State's largest circuits. This method was consistent with the State Bar historic rules prior to its proposed advisory opinion.

[10] Circuits selected demonstrate the most dramatic changed noted thus far in the wake of the State Bar's Proposed Advisory Opinion.

STANDARDS

One responsibility of the Council is to propose standards that act as rules or guidelines for public defenders statewide. Originally, O.C.G.A. 17-12-8 (c) stated: "The initial minimum standards promulgated by the council pursuant to this code section which are determined by the General Oversight Committee for the Georgia Public Defender Standards Council to have a fiscal impact shall be submitted by the council to the General Assembly at the regular session for 2005 and shall become effective **ONLY** when ratified by joint resolution of the General Assembly and upon approval of the resolution by the Governor or upon its becoming law without such approval. **The power of the council to promulgate such initial minimum standards shall be dependent upon such ratification.**" (emphasis added)

Subsection (c) above was deleted and amended in the 2008 legislative session due to the Council's transfer from the judicial to the executive branch. Now, all standards will need to be approved pursuant to the procedures set forth in the Administrative Procedures Act , unless, of course, a Plaintiff finds a judge who simply will legislate them into law by judicial fiat (see e.g. Fulton County Superior Court Judge Jerry Baxter's opinion in Flournoy v. State of Georgia, discussed below).

The Council is also responsible for determining the indigence status of all applicants for public defender services, and they have adopted standards to do so based on the Federal Poverty Guidelines. The legislative oversight committee explored the idea of hiring an independent third party to verify indigence claims via credit checks and other means, thus preventing the State and counties from paying for indigent defense services for defendants who do not meet the guidelines[11]. Even if such a system is ruled unconstitutional as a threshold qualification for service, there should be a system in place that allows the State and/or the counties to place liens on a defendant's assets if it is later determined that he/she lied about assets on the indigence application. Another cost-saving measure would be to statutorily change imprisonment options for misdemeanors so that fewer such crimes trigger the availability of indigent defense services.

In any event, it is clear under both the original code section and its subsequent amendments, that the legislature has the power to ratify proposed standards and the council's ability to promulgate such standards is contingent upon such legislative ratification. Several of the standards proposed by the Council were never ratified by the General Assembly or adopted into a joint resolution. Nevertheless, the Courts are now expressly usurping and disregarding this legislative power and are using judicial fiat to impose such standards by order. (See discussion of *Flournoy v. State of Georgia*, below).

[11] By way of example, the State currently verifies income level and indigency in the administration of its Medicaid program to confirm qualification and eligibility for benefits which results in significant savings to the State.

LITIGATION AGAINST THE STATE TO FORCE NEW POLICY:

Having failed to make their case to the elected legislators who are charged with making policy, advocates seeking to implement a more expensive system have pursued a course of filing lawsuits against the State of Georgia, the Governor and the Staff of the Georgia Public Defenders' Standards Council. These advocates seek judicial orders to mandate additional expenditures by the State.

The General Oversight Committee of the Public Defenders Standards Council received information that some of these advocates are openly manipulating the system in order to obtain a more favorable judicial result. In one case, the committee was told that a defendant was counseled not to meet with the public defender who had been appointed by the Court to represent him. That attorney subsequently argued that many months had passed without the accused having met with the public defender (without any mention that the appointed attorney had attempted to meet with his client).

The Southern Center for Human Rights has taken the lead in organizing and filing lawsuits against the State seeking judicial imposition of policies it promotes. The oversight committee has received email communications from Gerry Weber and others regarding their strategy for using this process. One such email dated June 18, 2009 to a group of fifteen private defense lawyers acknowledges that "each of you has expressed an interest in potential litigation" related to the "Garland" cases. The email goes on to say that the Southern Center for Human Rights is "setting up a process for finding some good plaintiffs" and invites the other private defense lawyers to meet to prepare "legal strategy, roles, etc."

On February 18, 2010, the U.S. Department of Justice conducted a 'National Symposium on Indigent Defense' in Washington, DC which included attorney Stephen Bright, President and Senior Counsel for the Southern Center for Human Rights, in Atlanta, GA (frequently a plaintiff's attorney filing suit against the State seeking to change the system through judicial orders). Mr. Bright moderated a workshop regarding "litigation solutions" for the "current crisis in indigent defense." The workshop agenda advertises that "systemic lawsuits have been filed challenging entire systems of indigent defense. [The] workshop will focus on litigation alternatives for dealing with the current crisis." In short, lawyers in Georgia are teaching workshops to lawyers in others states regarding how to sue their states to impose changes to the public defenders' system.

IMPACT OF SUPERIOR COURT JUDGES' ORDERS ON PUBLIC DEFENDERS' SYSTEM:

A series of lawsuits have been filed by advocates who seek judicial orders to force the State to implement new policies. Most recently, the Southern Center for Human Rights, the law firm of Bondurant, Mixson & Elmore and others filed a lawsuit in the Fulton County Superior Court seeking to certify a class action on behalf of Maurice Flournoy et al. and others similarly situated against the State of Georgia (Maurice Flournoy, et al v. State of Georgia, Superior Court of Fulton County Georgia, Civil Action File No.: 2009CV178947). The case was assigned to Judge Jerry W. Baxter.

In the underlying action in 2007 involving the lead Plaintiff, the Barrow County Superior Court tried and convicted Maurice Flournoy for his involvement in a violent criminal enterprise. Evidence at trial indicated that as the crime unfolded, it went from drug deal to armed robbery to murder, which left a 21 year old man dead. Mr. Flournoy is the named Plaintiff representing class of other convicted criminals who are suing the State of Georgia in a civil case to impose a new process for the public defenders system.

The case focused upon the timing rights of a convicted criminal to obtain another lawyer provided by the State to pursue his/her "Garland" appeal to allege that his first State-provided lawyer was incompetent in order to overturn his conviction or obtain a new taxpayer funded trial. The initial notice of appeal is filed by the trial counsel. The Public Defenders' System had a policy of requesting the case file and trial transcript in order to evaluate the nature of the appeal that could be pursued by the defendant. The GPDSC acknowledged responsibility for referring the case to an appellate attorney but argued that it should do so once they received the case file and court transcript and could evaluate the claims and whether reasonable grounds existed to pursue a "Garland" 'ineffective assistance' appeal, and therefore appoint conflict appellate counsel.

At the conclusion of hearing the evidence and testimony, Judge Baxter allowed the Plaintiffs' attorneys (Southern Center for Human Rights, et al.) to draft the proposed Order for the Court to enter. Judge Baxter entered the Plaintiffs' attorneys proposed Order on February 23, 2010.

In the order, Judge Baxter certified Plaintiffs as a class to pursue their claims against the State. He also ordered that the Public Defenders' System institute a policy to appoint appellate counsel for all defendants convicted at trial within 30 days regardless of whether the appellate counsel had received a case file or trial transcript to evaluate the potential issues for appeal. Judge Baxter also rewrote the indigent defense system by ordering the imposition and adoption of a policy to limit the caseload of appeals lawyers to a maximum of 25 cases per attorney. In legislating this new policy the Judge cited the American Bar Association ("ABA") Standard 3 "Caseload Limits and Types of Cases" as well as "Standards" which were passed by the GPDSC but expressly not adopted by the legislature (see footnote 8 of the Court's 'Order on Class

Certification and Mandamus, Maurice Flournoy, et al v. State of Georgia, Civil Action File No.: 2009CV178947, p.5).

As noted above in the discussion regarding "Standards," the statutes expressly reserve the ratification of any standards to the legislature and State that the power of the council to promulgate such standards is contingent upon such ratification. These standards were neither ratified by the legislature nor did they become adopted under the process outlined in the Administrative Procedures Act – a fact merely ignored by Judge Baxter.

In implementing policy recommendations of the American Bar Association despite the legislative oversight committee expressly choosing not to ratify such standards, Judge Baxter has overtly substituted the policy judgment of the Court for that of the elected legislature. The Court should respect the separation of powers of government and not usurp the legislature's decision not to adopt the ABA's policies. Instead, the Court has adopted an order drafted and submitted by Plaintiffs' counsel which adopts the American Bar Associations' policy positions, word-for-word.

The legislature considered testimony and proposals about the ABA and expressly chose not to adopt them, at least in part, because they are far from an unbiased source. The ABA has come under fire for its consistent adoption of very public liberal policies. In 2009 the New York Times published an opinion editorial indicating that the ABA "takes public and generally liberal positions on all sorts of divisive issues. By way of example, studies suggest that [federal judicial] candidates nominated by Democratic presidents fare better in the group's ratings than those nominated by Republicans."[12]

"Holding all other factors constant," the study found, "those nominations submitted by a Democratic president were significantly more likely to receive higher ABA ratings than nominations submitted by a Republican president. The differences matter, said Amy Steigerwalt, a political scientist at Georgia State and an author of the study, along with Robert L. Vining, Jr. of the University of Georgia and Susan Navarro Smelcer of Emory." (Id.)

The ABA's public policy positions are frequently antithetical to that of the policy-makers who are elected by the majority of Georgia's citizens to make governing decisions. The ABA has consistently taken public positions on controversial public policy topics. It favors a much liberalized policy on abortion issues; supports additional stringent gun control measures[13], opposes capital punishment and requires law schools to implement affirmative action programs to retain their accreditation. These policies are so left-leaning that the Federalist Society has

[12] ("As the Bar Gets Its Voice Back on Judges, Advice May Ring Familiar," Adam Liptak, *The New York Times,* New York Edition, March 31, 2009, p. A14. www.nytimes.com/2009/03/31/us/31bar.html?_r=2) (See also "Yes, the ABA Rankings are Biased," James Lundgren, *Wall Street Journal,* August 6, 2001. www.opinionjournal.com/extra/?id=95000927)

[13] *See* ABA Policy on Gun Violence – Special Committee on Gun Violence – American Bar Association. www.abanet.org/gunviol/abapolicyongunviolence/home.shtml

taken to sponsoring a semi-annual publication called "ABA Watch" to report on the liberal political activities of the ABA.

If the elected legislature representing a clear majority of Georgia's citizens has made policy decisions which run counter to those of the left-leaning ABA, a Fulton County Superior Court Judge (or any other Court) should not be allowed to usurp the authority of the legislature and forcibly impose such policies upon the legislature.

In addition to the assistance being rendered to indigents accused of committing crimes in Georgia, the ABA has also recently offered assistance to those suspected of being military combatants terrorists who are detained at the Guantanamo Bay Naval Base. ABA President Carolyn Lamm has written to criticize the use of military commissions as a venue to try terrorists arguing that they are "constitutionally flawed and scorned by the international community."[14]

In 2003 the ABA House of Delegates defended the position argued by the suspected terrorists by urging Congress and the Executive Branch to ensure that all detainees in any military commission trials receive "zealous and effective" assistance of civilian defense counsel. The ABA opposed the Bush administration policies concerning the treatment of those suspected of being involved in terrorist activities against the United States and filed amicus curiae briefs opposing the United States administration positions in *Hamdi v. Rumsfeld* in the US District Court for the District of Columbia, in *Padilla v. Rumsfeld* in the United States Court of Appeals for the Second Circuit and in *Boumediene v. Bush* in the United States Supreme Court.

The ABA also issued a transition paper in December of 2008 entitled "Anti-Terrorism and Preservation of Civil Liberties," which defended the position argued by the suspected military combatants being detained and harshly criticized the use of military commissions to try their cases. In December, the ABA's Standing Committee on Law and National Security even went as far as creating a searchable database to help document all habeas litigation involving Guantanamo detainees. The database contains every Guantanamo and Bagram Air Base detainee habeas petition brought before the D.C. courts since the Supreme Court's ruling in *Boumediene v. Bush.*

Nowhere in Judge Baxter's voluminous 39 page Order does he ever discuss the actual costs or fiscal impact of its order on the State's general fund or the impact on other priorities that the State is constitutionally required to fund.

Almost as an afterthought, the Order mentions on page 35 that the Court is, "mindful of the budgetary constraints faced by [the State] and other governmental entities." But he goes on to

[14] www.abanet.org/poladv/letters/antiterror/2009nov25_guantanamo_1.pdf

quote from the Garland decision that "**budget considerations raised by the Council do not constitute a proper policy matter for this Court**."[15]

Interestingly, after pleading that budget matters are not within the jurisdiction of the Court, Judge Baxter goes on to comment on the budget matters in footnote 38 on page 35, editorializing his opinion that "regrettably" he believes certain moneys that could have been spent from the State General Fund on free lawyers for people accused of (and in this case actually convicted of) crimes were "redirected" to other State needs. Thus, it appears that after disclaiming any concern about budgetary impact, Judge Baxter offers his judgment not only as a legislator but as a member of the Appropriations Committee as well.

Immediately upon the issuance of the Court's Order and Writ of Mandamus erroneously legislating a new and unfunded policy for the statewide public defenders' system, the Plaintiffs' attorneys filed a 'Notice of Filing Objections to Assignment of Counsel.' With this, the Plaintiffs' attorneys serve notice of their intent to ask the Court to invalidate the conflicts representation contracts in which private attorneys voluntarily engaged, arguing that the Court should not allow lawyers to perform under contracts of which they have voluntarily negotiated and agreed. While many other states have adopted similar cost containment measures (see discussion of Cost Containment below), Plaintiffs seek to greatly expand the payment to private attorneys from moneys in the State General Fund from which almost every other State priority is funded.

Sadly, while many other states have adopted cost containment measures to help provide some management assistance and predictability to their budgets, our Courts and the State Bar have decided that people who commit crimes in Georgia are deserving of special treatment, regardless of the cost to other critical needs of the taxpayers.

[15] Court's 'Order on Class Certification and Mandamus, Maurice Flournoy, et al v. State of Georgia, Fulton County Superior Court Civil Action File No.: 2009CV178947, p. 35 (emphasis added).

INDIGENT DEFENSE FUNDING FY00 – FY10

Prior to the creation of the Georgia Public Defender Standards Council (GPDSC or "The Council") counties contributed approximately 90% of the total costs for Georgia's indigent defense system. While the State, through the Georgia Indigent Defense Council (IDC) contributed the remaining 10% in the form of grants to counties.

Since the current statewide public defender system was established, the State's contribution has risen to approximately 40% of the total costs, however; the amount invested by the counties has remained approximately the same.

Fiscal Year	State General Funds	Agency Funds	Total State	% State	Total County (1),(2),(3)	% County	Total Costs
2000	$5,262,000	$0	$5,262,000	9.70%	$48,935,814	90.30%	$54,197,814
2001	$5,821,227	$16,161	$5,837,388	9.50%	$55,419,947	90.50%	$61,257,335
2002	$7,259,946	$0	$7,259,946	10.10%	$64,314,561	89.90%	$71,574,507
2003	$7,682,177	$0	$7,682,177	9.80%	$70,534,144	90.20%	$78,216,321
2004 (4)	$9,304,145	$0	$9,304,145	-	-	-	-
2005	$29,808,043	$1,200,000	$31,008,043	35.50%	$56,310,197	64.50%	$87,318,240
2006	$37,079,060	$3,359,775	$40,438,835	37.60%	$67,123,428	62.40%	$107,562,263
2007	$36,341,079	$1,972,832	$38,313,911	36.50%	$66,773,894	63.50%	$105,087,805
2008	$35,430,140	$4,835,038	$40,265,178	37.60%	$66,773,895	62.40%	$107,039,073
2009	$35,010,269	$1,700,000	$36,712,278	34.40%	$70,000,000	65.60%	$106,712,278
2010	$39,789,395	$1,200,000	$40,989,395	36.93%	$70,000,000	63.07%	$110,989,395

(1) FY00 - FY03 Actual county expenditures
(2) FY05 - 08 Amount budgeted - actual expenditures not available
(3) County Funds for FY09 and FY10G are estimates of the actual expenditures. Data is not readily available for these fiscal years.
(4) Expenditures or amount budgeted not available

FY10 General Appropriations Act (HB119)

In the FY10 General Appropriations Act (HB119), GPDSC received an appropriation of $41,489,395 total funds (State General Funds (SGF) =$39,789,395; Agency Funds =$1,700,000).

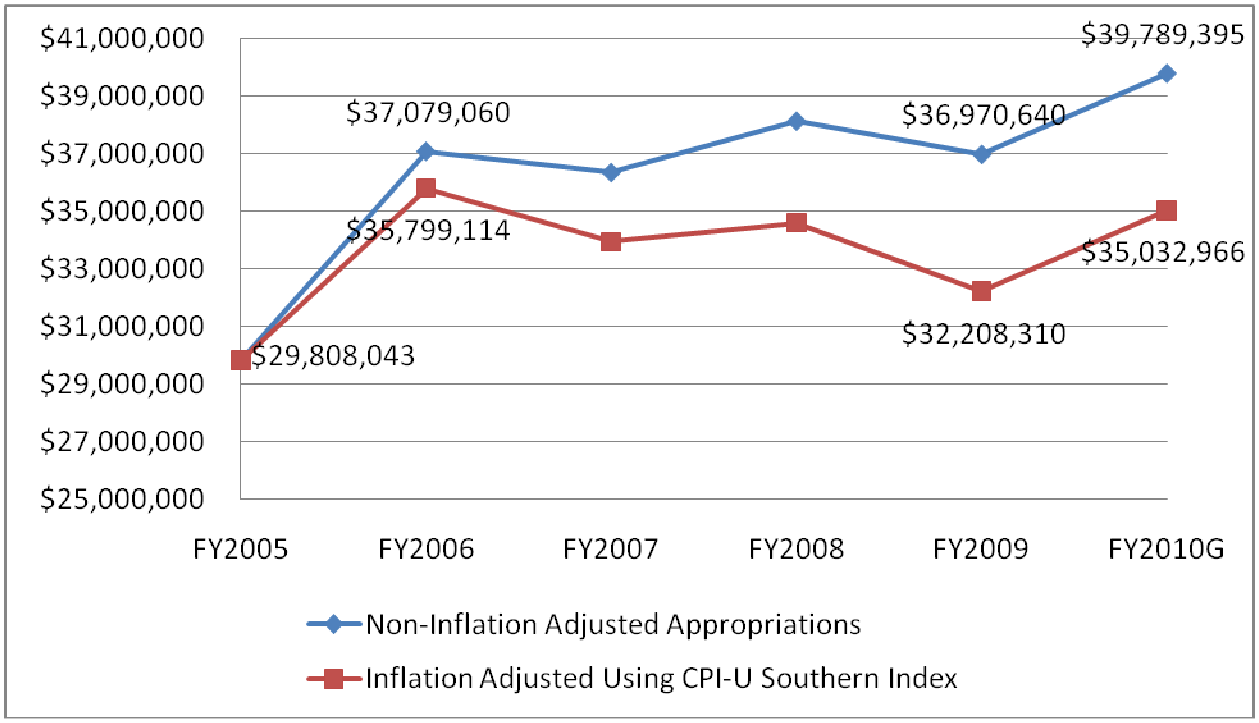
The State Constitution expressly prohibits any funds being earmarked for a specific purpose unless such purpose is codified by constitution amendment. Accordingly, all revenue streams become part of the State General Fund and are used to fund all of the State's priorities. This certainly includes revenue streams that were created to help fund parts of the indigent defense system. Prior to FY07, the Council's budget requests were capped at no more than the *projected* amount the fund would collect. In FY07, the GPDSC's budget requests were statutorily prohibited from exceeding the *actual* amount collected by the indigent defense fund the preceding year. Upon the adoption of HB1245 (2008 Session) GPDSC's budget was no longer to be indexed or related in any way to the funds collected by the State General Fund Revenue stream created by HB1EX. After July 1, 2008, the GPDSC, as an executive branch agency, engaged in the typical appropriations process where they have been repeatedly requested to submit a zero-base budget which justifies the amount of spending which is called for by the activities the code requires.

Historical GPDSC Appropriations

Fiscal Year	Non-Inflation Adjusted Appropriations	Inflation Adjusted to 2005 Dollars (CPI-U South)	% Change
2005	$29,808,043	$29,808,043	
2006	$37,079,060	$35,799,114	20.10%
2007	$36,341,079	$33,933,273	-5.21%
2008	$38,130,140	$34,597,848	1.96%
2009 Adj.	$36,970,640	$32,208,310	-6.91%
2010G Adj.	$39,789,395	$35,032,966	8.77%

*Adjustments made in FY09 and FY10 to account for SHBP reductions and stimulus funds.
**The change from FY08 to FY10G adjusted is 1.26%
The median change for all State agencies from FY08 to FY09 Adjusted for all State agencies was -5.86%
The median change for all State agencies from FY09 adjusted to FY10G adjusted was 1.02%

GPDSC Appropriations Adjusted for Inflation



GPDSC Appropriations by Program

	FY08 FINAL	FY09 Adjusted For No SHBP*	FY10G	Change from FY08-FY10G
Public Defender Standards Council	$6,720,338	$6,126,688	$6,042,063	-10.09%
Public Defenders	$31,409,802	$30,843,952	$33,747,332	7.44%
Total	$38,130,140	$36,970,640	$39,789,395	4.35%

Special Project Program (HB 119)
As of November 1, 2009

FY	Projected Liability	Paid	%	Remaining
2005	$97,228	$35,602	36.60%	$61,626
2006	$317,446	$89,929	28.30%	$227,517
2007	$612,151	$152,997	25.00%	$459,154
2008	$583,343	$191,724	32.90%	$391,619
TOTAL	$1,610,168	$470,253	29.20%	$1,139,915

Language of the Special Project: Increase funds for all outstanding non-capital conflict liabilities over a two-year period beginning with liabilities for Fiscal Years 2005 ($97,228), 2006 ($317,446), 2007 ($612,151), and 2008 ($583,343).

Top 10 Circuits for Number of Conflict Cases for FY09

Circuit	FY2007	FY2008	FY2009	*FY2010 Estimated*
Atlanta	3,023	3,073	3,313	2925
Chattahoochee	869	812	364	372
Griffin	687	403	363	474
Alcovy	511	294	305	258
Macon	617	327	263	144
Western	319	212	253	171
Stone Mountain	793	466	247	300
Flint	245	121	245	294
Ocmulgee	318	163	222	195
Tifton	283	199	216	294

Atlanta Circuit Conflicts Cases as a % of Total Conflict Cases	
FY2007	11.86%
FY2008	18.62%
FY2009	22.83%
FY2010 Estimated	17.25%

COST CONTAINMENT CONCERNS

GPDSC's cost per case for private appointed counsel in non-capital felony conflict cases has increased from an average of *$367.00 in 2005 to over $1,000 today*. The Council attributes the increase in costs to the poor implementation of internal cost containment strategies.

If legislators choose to legislate cost containment strategies, conflict cases may be more efficiently managed by farming out conflicts to neighboring circuit offices, very similar to the model utilized by Missouri and outlined below.

In addition to Missouri's model, SBEO recommends further examining Virginia, Kentucky and Philadelphia's conflict case management strategies as potential models for a Georgia plan.

Other State's Models for Containing Costs in Conflict Cases

Besides setting an hourly rate for court appointed counsel to be compensated, many states have set statutory limits on the amount that may be paid per case. Some states set caps on these amounts per case by type of the case or by a flat annual fee usually through a contract with a private attorney. However, in all states, a judge has the authority to waive any caps in extraordinary circumstances.

1) **Statutory:** Set by the state legislature through legislation and/or the appropriations act.
2) **Administrative or Court Rule**: Set either by executive administrative rule (usually by the state Supreme Court) or court rule (usually as part of the state's rules of criminal procedure).
3) **Public Defender:** Rates are set by the state public defender office or equivalent are subject to appropriation.
4) **State Commission on Indigent Defense**: Rates are set by statewide public defender commissions or boards.

Notable States:

#1 – Missouri

Non-Capital Felony Conflicts: Approximately 75% of all conflict cases in the state are handled by transferring the case from the branch office where the conflict of interest arose to a neighboring branch office. For the remaining 25% of conflicts the public defender appoints counsel for a flat fee rate per case, usually between $500 - $750 depending on the complexity of the case and the time needed. If this flat fee is waived the attorney will then receive an hourly rate of $50.

- Most similar to SBEO's recommendation to manage conflicts through neighboring circuits.

Capital Conflict Cases: Missouri has a specialized death penalty trial unit and representation may also be handled by attorneys from the branch offices. However, in the event of a conflict or overload capital case, the Missouri Public Defender contracts with private attorneys for a flat fee rate of $10,000 - $13,000 for lead counsel and $5,000 - $8,000 for co-counsel. These rates do not include reimbursable expenses.

#2 – Virginia

Non-Capital Conflicts: The state Supreme Court has established rates of $90 per hour for all work in or out of court, however; state law caps per-case expenditures to no more than $1,235 for felony charges punishable for 20 years or more and limits all other felony charges at $445 per case.

The Virginia General Assembly passed legislation during the 2007 session that would cap the amount allowed for waivers so the maximum of $1,235 for felony charges punishable by 20 or more years may be waived up to $850 while the maximum of $445 to defend all other felony charges may only be waived up to $155. While counsel may request additional waivers above these amounts all waivers are subject to funding. This legislation, SB1168, says *"If at any time the funds appropriated to pay for waivers under this section become insufficient…no further waivers shall be approved."*

Capital Conflict Cases: The Virginia General Assembly authorized the creation of four regional capital defender offices. In every capital case the defendant is given two attorneys of which one, who serves as the lead chair, is an employee of one of these regional offices. For private attorneys an hourly rate of $125 has been set by the state Supreme Court but no limit is set.

#3 – Kentucky

Non-Capital Conflicts: Each of the 30 Department of Public Advocacy (DPA) offices enter into a "conflict contract" where attorneys are either paid a flat fee per case or a trial bonus. Private attorneys who do get reimbursed on an hourly basis are paid $40 per hour for non-violent felonies and $50 per hour for violent felonies but per case maximums are set depending on the type of felony and if the case goes to trial.

Capital Conflict Cases: The DPA has a Capital Trial Branch consisting of seven death penalty attorneys, the Louisville Metro Public Defender has its own death penalty unit with four death penalty attorneys and attorneys in the DPA's field offices can handle death penalty cases. Any appointed counsel receives an hourly rate of $70 with a maximum per attorney of $30,000 which may be waived if necessary.

#4 – Philadelphia, PA

Non-Capital Cases: In Pennsylvania the decision regarding the compensation and policy for court appointed attorneys resides with local judges and vary widely across the State. Philadelphia moved from an hourly rate to a "Modified Guaranteed Fee System" where appointed attorneys are reimbursed on a per-diem basis with the fee payable as follows:

Preparation Fees:

* Non-homicide felony, disposition after arraignment but prior to trial: $400
* Non-homicide felony, disposition at trial: $650
* Homicide, disposition after arraignment but prior to trial: $1,133
* Homicide, disposition at trial: $1,700

Pier Diem Fees:

* Non-homicide felony, 3 hours or less: $175
* Non-homicide felony, more than 3 hours: $350
* Homicide felony, 3 hours or less: $200
* Homicide felony, more than 3 hours: $400

Capital Conflict Cases: The same "Modified Guaranteed Fee System" is used for capital conflict attorneys with the fee payable as follows:

Preparation Fees:

* Homicide, disposition after arraignment but prior to trial: $1,133
* Homicide, disposition at trial: $1,700
* Mitigation appointment: $1,700

Pier Diem Fees (at trial):

* Half day, 3 hours or less: $200
* Full day, more than 3 hours: $400
* Mitigation, half day: $100
* Mitigation, full day: $200

CONCLUSION & RECOMMENDATIONS

The State is facing an historic revenue shortfall and is working to fund all of its constitutional obligations and needs including its constitutional obligation to balance the State budget. No single State priority, regardless of how important and well-justified, can escape the practical reality that far less funds are available for the State's service delivery. It is clear that despite doubling the amount of money for indigent defense from $54 million to approximately $111 million, the State can not satisfy those who seek to provide expensive private attorneys for free to those accused of crimes, in excess of what the Constitution requires.

While the core function of the statewide system is working with relative efficiency at the local circuit public defender level, some ardent defense advocates are seeking extra-legislative methods of forcing the State to adopt policies that simply are unsustainable. The litigation agenda is compounded by the State Bar's issuance of a proposed advisory opinion disqualifying the statewide system structure and the willingness of Courts to simply issue orders against the State without any concern about their fiscal impact. This combination threatens not just indigent defense, but also many other important State priorities such as education, healthcare and public safety. As a result, there is no way for any conflict system to be sustained at the State level and this portion of the system should no longer be continued as part of the statewide system.

When the State Bar and members of the bench issue opinions which have great fiscal impact on the State without any accountability to the taxpayers for balancing the State budget, there is no accountability on spending and legislative authority is usurped. Moreover, when cases are outsourced to private attorneys who are not even allowed to voluntarily contract with the State, then those attorneys will be left with an ethical obligation to zealously advocate on behalf of their client without any financial checks and balances or even cost considerations.

Accordingly, since the opinion of the State Bar and the Courts have rendered a statewide system unsustainable, it is the opinion of the Chairman that the State funding for all conflict cases should granted back to the counties and allow them to directly manage the expenditure of funds similar to the manner in which such cases were handled prior to the current system which the State Bar and judiciary has rendered unsustainable.